Accepting a Determination of the Financial Ombudsman Service, or Damned if You Do...?
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In Clark v In Focus Asset Management [2014] EWCA Civ 118, a unanimous Court of Appeal has decided that where a complainant accepts a determination made by the Financial Ombudsman Service (‘FOS’), the doctrine of res judicata may apply. If the complainant accepts an FOS determination which was in substance based on a set of facts which constitutes a cause of action on which the complainant then seeks to rely in the civil courts, then he will not be permitted to proceed with his claim.

Clark at the FOS: In 2004, Mr and Mrs Clark were advised by In Focus Asset Management (‘In Focus’) to invest a pot of cash they were sitting on, together with some loan proceeds, in endowment plans. They did so, with, on their case, disastrous consequences. They assessed that they had lost more than £300,000, if not half a million. In November 2008, they complained to the FOS that In Focus had not given them advice appropriate to their appetite for risk. The FOS upheld their complaint and in its determination awarded them compensation of what was then the maximum sum of £100,000 (it is now £150,000); it also recommended that In Focus should pay more. In Focus declined.

FSMA s.228(5) provides that:

‘If the complainant notifies the ombudsman that he accepts the determination, it is binding on the respondent and the complainant and final.’

Mr and Mrs Clark’s solicitor was worried about this and asked the FOS whether they could sue for the balance if they accepted the award. The FOS replied with words to the effect that it had no idea and they should go tell it to the Judge. Mr and Mrs Clark decided to accept the award on 8 February 2010. But they added a handwritten proviso: ‘We reserve the right to pursue the matter further through the civil court.’ In June 2010, they issued a claim for negligence against In Focus, relying on materially the same allegations as they did before the FOS.

Andrews: A few months later, HHJ Pelling QC handed down judgment in Andrews v SBJ Benefit Consultants [2011] PNLR 577. He held that, where a complainant accepts a determination of the FOS, the complaint merges with the award, extinguishing any cause of action arising out of the facts founding the complaint. The determination became ‘binding and final’ for all purposes. Mr Andrews’ claim for breach of statutory duty under FSMA s.150 was based on the same subject matter as had been the subject of a final FOS award and so was struck out.

Clark in the High Court: Mr and Mrs Clark’s claim was unsurprisingly dismissed at first instance. However, in December 2012 Cranston J upheld their appeal: see [2012] EWHC 3669 (QB). He thought that Andrews was wrong. Merger was inapplicable to mere ‘complaints’ to the FOS, which does not consider ‘causes of action’: see R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service Ltd [2008] Bus LR 1486. That the Court of Appeal in Heather Moor had said that the FOS was a tribunal for the purpose of the European Convention on Human Rights doesn’t make it a tribunal for the purposes of merger; functional analysis of the FOS led to a different conclusion. For instance, no tribunal that he knew of had power to make ‘recommendations’, binding on nobody. He disagreed with the Andrews approach to statutory interpretation. Instead of narrowly focussing on the meaning of ‘final’ in FSMA s.228(5), one should look at the statutory aims to provide a scheme for the expeditious and informal resolution of disputes. ‘Final’ just means ‘bringing an end to the FOS process’. Why, he asked rhetorically, shouldn’t a successful complainant use his £100,000 (or whatever) award as a fighting fund against his negligent advisor in a future civil claim? Surely consumer protection was enhanced by allowing these claims to proceed? Since FSMA s.228(5) was at best neutral on the issue, it followed that the doctrine of merger was inapplicable. With two inconsistent High Court decisions now floating around, In Focus appealed.

Clark in the Court of Appeal: The debate to date had been all about the doctrine of merger. Before the Court of Appeal, it changed tack, to become more interested in res judicata, and more particularly with cause of action estoppel. Merger and res judicata are overlapping doctrines, but not identical.
Merger is all about what happens to a cause of action when a tribunal gives judgment: it merges with the judgment, so a claimant’s remedies arise from the judgment and not from the extinguished cause of action.

*Res judicata* applies where a court or tribunal has already adjudicated on the matter and presents an absolute bar to a second set of proceedings, without any question of discretion arising. The species of *res judicata* called ‘cause of action estoppel’ arises where a judgment has been given on a whole cause of action. For cause of action estoppel to apply, a defendant needs to show (i) a juridical decision, (ii) which was pronounced by a tribunal with jurisdiction over the parties and the subject matter, (iii) which was final and on the merits, and (iv) which determined the same question between the same parties as are involved in later litigation (or a decision *in rem*).

The main areas of contest in the Court of Appeal were:

- Whether the FOS was a ‘juridical’ tribunal in the appropriate sense;
- Whether a complaint to the FOS could in principle be said to be the ‘same’ as a cause of action; and
- Whether there was anything in FSMA s.228(5) which should affect the decision as to whether cause of action estoppel applied.

**Juridical Tribunal:** This did not trouble the court much. Arden LJ (giving the leading judgment) said that the FOS process resulted in a juridical award because it was not simply inquisitorial or administrative but allowed (in fact, required) the parties to state their case.

**Cause of Action:** At [74], Arden LJ said that the ‘key point’ was whether a complaint to the FOS could ever amount to a ‘cause of action’. To understand the question, you need to understand its terms. ‘Cause of action’ is one of those grandiose phrases used by lawyers which on closer analysis turns out to be nothing especially grand. In *Letang v Cooper* [1965] 1 QB 232 at 242, Diplock LJ said it just describes ‘the various categories of factual situations’ which (when the law is applied to them) can result in a litigant obtaining a remedy by court order. A cause of action is a set of facts. A complaint may consist of or include facts which constitute a cause of action. That was, said Arden LJ, enough to show that a complaint may be a cause of action. No matter that the FOS did not have to determine whether those facts amounted to a cause of action in law, nor whether the complainant’s rights had been infringed, since it was on the basis of those facts that the FOS made its determination. The FOS’ jurisdiction to determine complaints by what was ‘fair and reasonable’ did not mean that a juridicable set of facts was not (to use Arden LJ’s word) ‘pleaded’ in the complaint. No matter that the FOS has other functions than that of determining complaints: *res judicata* would only apply when it was asked to determine the merits. No matter even that the Clarks had sought to reserve their rights to claim in their acceptance, because *res judicata* was automatic: if, after making a binary election (accept / don’t accept), they were debarred from asserting a right, they could not undebar themselves by tricks of language.

So, subject to anything that FSMA may have to say about it, cause of action estoppel could apply in principle.

**Statutory Scheme:** The question posed by the Court of Appeal was: does anything in FSMA demonstrate that Parliament intended that *res judicata* does not apply to FOS awards? FSMA is silent on the point. At [111], Arden LJ effectively said that that was enough to dispose of the appeal against the Clarks: the common law applies where the statute is silent. However, Cranston J’s emphasis on the purpose of FSMA had to be grappled with. In seeking to do so, the Court of Appeal’s reasoning may come across as somewhat questionable.

As the Court of Appeal saw it, Cranston J didn’t think closely enough about the prescribed limit on FOS awards. If Parliament had intended that a complainant could recover more than £100,000 (or £150,000) in a scheme for ‘resolving’ disputes, why impose a limit at all? The unkind reader might think this is just another way of putting the question, not an answer.
Further, the power to make recommendations was no indication that the complainant had a right to issue proceedings, using the recommendation as a basis for negotiation in the meantime. Quite the contrary, it suggested that Parliament wanted to make provision for the case where there might be a claim in excess of the maximum but where the complainant was content with an award. Obviously so, but that doesn’t explain what purpose the power serves. (Whether the argument that its purpose is to give room for negotiating manoeuvres stands up to scrutiny is another question.)

**Conclusion**: Ultimately, the reasoning really came down to this: FSMA is silent, so res judicata applies. Ironically, Cranston J’s reasoning might be said to have started from precisely the same point, but to have ended up at with the opposite conclusion. One has to ask: where a complainant thinks he has a good case to get more than the FSMA cap on FOS awards, what is the point of him complaining to the FOS at all? Is it really no more than to get a quick, cheap, early and non-binding indication of merits? If so, is the Court of Appeal tacitly encouraging complainants to make complaints whose determinations they have, from the outset, no intention of accepting?

The Court of Appeal’s approach of first ignoring FSMA and then checking whether FSMA had anything to say in response to the ‘common law conclusion’ is problematic. How its conclusion stands with the fact that the dismissal of a complaint cannot prevent a complainant from issuing proceedings was not analysed, but is perhaps important: is the rationale permitting an unsuccessful complainant to proceed with a claim that res judicata does not apply, or that in principle it does but is subject to a statutory exception under FSMA? Since a complainant is entitled to reject (or ignore) an adverse determination, can it really be said that a determination is a juridical decision, i.e. the decision of a tribunal?

Somewhat late in the day, the Court of Appeal sought to assuage complainants by pointing out that the burden will always fall on the defendant to prove sufficient similarity between the factual scenarios of the complaint and the claim. For the doctrine of res judicata to apply, the facts alleged in the claim have to be materially the same as those raised in the complaint. There will perhaps be some cases in which the respondent to the complaint has a hard time establishing quite what was the basis of the complaint. That will be of scant comfort to complainants.

Finally, the Court of Appeal raised the question (without deciding the issue) of the application of the rule in *Henderson v Henderson* (1843) 3 Hare 180; where a party could have brought a claim in earlier proceedings, the court will (not ‘may’) strike out or stay his new claim as an abuse of process if, on the application of a ‘broad, merits-based approach’, it determines that he ought to have done so. Arden LJ said that the *Henderson v Henderson* doctrine was a species of res judicata, so it would seem that she probably thought it would apply to FOS determinations; Davis LJ was more sceptical. We can expect many strike-out applications by financial advisors facing claims after a ‘binding and final’ FOS determination in circumstances where strict res judicata is inapplicable. And we may have another anxious few years waiting for the Court of Appeal to decide whether the doctrine applies.

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